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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-299

GENE HENDERSON, doing business as Henderson Plumbing and Heating Company,
Petitioner,

vs.

PLUMBER'S LOCAL No. 8 OF THE AMERICAN FEDERATION OF LABOR, an unincorporated labor organization, and WALTER CROSS, JACK MEANY, JR., LOUIS STINE, SETH SLOCUM, JOHN LIND, FRANK W. FISHER, WILLIAM AKIN, R. P. FLAIGLE, JOHN GRINDINER, R. J. ERISMAN, ARNOLD VAN TRUMP, BERNARD T. HENEMAN, and EVERETT WILLIAMS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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TABLE OF CONTENTS

The Opinion Below 1

Jurisdiction 2

Questions Presented 2

The Federal Statutes Involved 4

Statement of Facts 5

Reasons for Granting the Writ—

I. The Decision Below Is in Direct Conflict with the Principles Announced by This Court in the Garmon, Weber and Other Decisions, All of Which Require a Showing of Facts Reasonably Within the Applicable Sections of the Federal Act in Order to Deprive State Courts of Their Common Law Jurisdiction Over the Acts of Labor Unions Committed Without the Existence of a Legitimate Labor Objective to Justify Them 9

II. The Opinion Below, in Giving Evidentiary Value to the Refusal of the Regional Director to Issue a Complaint, Notwithstanding the Non-Existence of a Legitimate Labor Objective and the Admitted Fact That the National Labor Relations Board Made No Finding of Facts to Support Its Jurisdiction, Is in Direct Conflict with the Fundamental Principle Fully Recognized by Numerous Decisions of This Court, That Jurisdiction of the Subject Matter Must Be Affirmatively Shown, and Cannot Be Waived, or Conferred by Prior Action, Consent or Estoppel 16

Table of Authorities

CASES

Adams Dairy Company v. *Burke*, (Mo.) 293 S.W.2d 281 ..... 10, 11, 12, 13, 14

Adams Dairy Co. v. *Burke*, 352 U.S. 969 13
American Fire Ins. Co. v. *Finn*, 341 U.S. 6 19
McNutt v. *General Motors Acceptance Corp.*, 298 U.S. 178 ..... 17, 18
McNutt v. *McHenry Chevrolet Co.*, 298 U.S. 190 17
NLRB v. *Indiana Desk Co.*, (7th Cir.) 149 F.2d 987 14
San Diego Building Trades Council v. *Garmon*, 359 U.S. 236 ..... 9, 11, 12, 13
U. S. v. *Corrick*, 298 U.S. 435 18
U. S. v. *Griffin*, 303 U.S. 226 18
Weber v. *Anheuser Busch*, 348 U.S. 468 ..... 9, 11, 12, 13

STATUTES

National Labor Relations Act of 1947, as amended (29 U.S.C. Sections 141, et seq.)—

Section 141(b) 4
Section 151 4
Section 152-(9) 4
Section 158(a)(1)(2)(5) 4
Section 159(a) 4
Section 160(a) 4

OTHER AUTHORITY

Britannica World Dictionary, Vol. I, pp. 284, 369 13

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

The petitioner, Gene Henderson, prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of the State of Missouri, rendered in these proceedings on May 10, 1971.

THE OPINION BELOW

The opinion of Division No. 1 of the Supreme Court of the State of Missouri, as yet unreported, appears in the Appendix, filed separately herewith, at pp. 2-9.[1] Petitioner's timely motion for a rehearing, or in the alternative, to transfer the cause to the Court of Missouri (A. 9-28) was duly filed on the 22nd day of May, 1971, and was, by said Division No. 1 of said Supreme Court overruled by order entered on the 14th day of June, 1971, without opinion (A. 31).

JURISDICTION

The opinion and judgment of Division No. 1 of said Supreme Court of Missouri was entered on May 10, 1971 (A. 1); and, upon the entry of the order overruling petitioner's motion to transfer the cause to the Court en banc, on the 14th day of June, 1971 (A. 3) became the final judgment of the Supreme Court of the State of Missouri on that day; and this petition for certiorari was filed less than ninety days from the date last aforesaid.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3), and Rule 19(a) of the Rules of this Court as adopted June 15, 1970, effective July 1, 1970.

QUESTIONS PRESENTED

The questions arising, and upon which the final decision of this Court should be made, are:

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1. Page references to the Appendix, filed separately will be indicated as follows: (A.). Page references to the original record in the court of first instance (which may be filed herein if the writ is granted) will be indicated as follows: (Orig. Rec. 1st Tr. p.) to indicate matters appearing in the record of the preliminary hearing before the court of first instance; and (Orig. Rec. 2nd Tr. p.) to indicate matters appearing in the record of the final hearing before the court of first instance.

1. Where an employer is under a binding labor contract with one union[2] does another union have the right to picket under the claim that such employer provides substandard wages and other benefits for his employees, even though such employer, under his union contract, is powerless to deal with the picketing union?

2. Where the employer presented a charge to the Regional Director of the National Labor Relations Board in an effort to avoid the unlawful picketing, and, after investigation, the Regional Director refused to issue a complaint thereon, and there is no showing that the Regional Director conducted any hearing or had any proof of the existence of a labor dispute adversely affecting interstate commerce, and there was no hearing either before the Regional Director or before the National Labor Relations Board, and no findings were made establishing the existence of a labor dispute, did the filing of that charge, and the refusal of the Regional Director to issue a complaint thereon constitute an assumption of jurisdiction by the National Labor Relations Board over the subject matter of a later cause of action filed by the employer in the State court for damages for conspiracy and for an injunction to prohibit the unlawful picketing, and operate to defeat the jurisdiction of the State court over that cause?

3. In the absence of an express finding by the National Labor Relations Board on such jurisdictional issue, can it be said (as the court below, in its opinion, said)

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2. In the case at bar, the petitioner, Henderson, is under a binding contract with Local Union No. 14436, District 50, United Mine Workers of America, an entirely separate and distinct labor organization, constituting that union as the sole and exclusive bargaining agent for Henderson's employees, which contract fully provides for the wages and working conditions of said employees—a labor union duly certified as the exclusive bargaining agent for petitioner's employees.

that the Board's "acceptance"[3] of the "complaint" involving the picketing is of evidentiary value in determining whether or not a labor dispute is involved in the jurisdictional sense?

(No issue is tendered by this petition for writ of certiorari as to interstate commerce, because, as is pointed out in petitioner's motion for rehearing in the Court below—A. 23, 24, in the absence of a labor dispute within the meaning of the Federal Act, the alleged interstate character of the matters before the Court would not be sufficient to confer jurisdiction upon the National Labor Relations Board, nor to deny jurisdiction in the State courts.)

THE FEDERAL STATUTES INVOLVED

The following sections and sub-sections of the National Labor Relations Act of 1947, and amendments thereto (29 U.S.C. Sections 141, et seq.), the pertinent parts of which are set forth in the Appendix, at the pages indicated below:

Section 141(b) (A. 51)
Section 151 (A. 52)
Section 152-(9) (A. 52)
Section 158(a)(1)(2)(5) (A. 53)
Section 159(a) (A. 53)
Section 160(a) (A. 54)

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3. The language of the opinion of the Court below is: "Also to be considered was the Board's acceptance of the complaint involving the picketing here in question." (A. 6). The fact is that no complaint was ever issued. A charge was filed with the Regional Director, who, after an ex parte investigation and without the hearing of testimony of witnesses subject to cross-examination, determined that there was insufficient evidence upon which to issue a complaint, and none was issued. Consequently, the National Labor Relations Board never received or heard any complaint, took no evidence, and made no finding of facts nor determination of whether or not a labor dispute was involved.

STATEMENT OF FACTS

The facts relevant to the questions presented by this petition for certiorari are, in the main, uncontroverted, and therefore may be presented to the Court in summary fashion.

The petitioner, Gene Henderson, is a plumbing contractor, engaged in installing plumbing in new house construction in the area of Raytown, a suburb of Kansas City, Misouri. He is under a binding labor contract with Local Union No. 14436, District 50, United Mine Workers of America (not to be confused with the defendant Local No. 8, American Federation of Labor). For some years before, and during, the activities of Plumber's Local No. 8 and its agents which form the subject matter of this suit, the District 50 union was, and still is, the duly recognized and certified bargaining agent of all of Henderson's employees; and the defendant Local No. 8 did not represent his employees and had no legal right to speak for them in any way.

Nevertheless, on or about October 22, 1963, and continuing until enjoined by the court of first instance in the instant suit, the representatives of Local No. 8 began the picketing of job sites where Henderson was engaged in installing plumbing, carrying banners which charged that Henderson's employees "do not receive all of the benefits, such as pensions, health and welfare plans and other advantages which have been established in this area by Plumbers Local No. 8, AFL-CIO. We are not asking for recognition nor do we desire to represent their (Henderson's) employees and we have no dispute with any other employer" (A. 3).

Other crafts engaged in other types of work on the houses where Henderson was installing plumbing refused

to cross that picket line, and, as a result, Henderson's men were forced to leave each job site and remain away so long as the pickets were there. The time lost thereby averaged 30 hours per job, additional time. 113 jobs were thus picketed, to the total damage of Henderson, as found by the trial court on undisputed and uncontradicted evidence, in the total amount of $43,672.00 (A. 47).

Although the banners did not use the word "wages", the testimony of defendant union's principal officers was to the effect that they were charging that Henderson pays substandard "wages". Actually, the wages paid by Henderson were and are substantially *higher* than those paid by other contractors working under labor contracts with defendant Local No. 8, the fact being that Henderson's contract with District 50 called for higher take home pay rather than additional fringe benefits.

The banners themselves were deceptive in that the words "Notice to the Public" and "Henderson Plumbing Company" appeared thereon in large red type, which could be read from a distance, while the remainder of the banner was in small black type which could *not* be read from a distance, and the undisputed testimony is that the impression was thereby created, in the minds of the public, that Henderson was "non-union".

After the picketing had continued from October 22, 1963 until June 4th, 1964, Henderson, in order to prevent the complete destruction of his business, instituted this suit, a common law action for damages inflicted upon him in the course of an unlawful conspiracy designed and intended to destroy his business (A. 32), and for an injunction to prevent continuance of the unlawful acts.

The federal questions sought to be reviewed were first raised in the court of first instance, the Circuit Court of Jackson County, Missouri.

Upon the filing of the petition, that court issued a temporary restraining order, restraining the unlawful conduct of the defendants until a hearing could be had on the merits. The first pleading of defendants was a motion to dissolve the temporary restraining order on the stated ground that the National Labor Relations Board had exclusive jurisdiction over the subject matter of the suit, and that the National Labor Relations Board is "presently conducting an investigation of said picketing" (A. 38).

Evidence was taken by the trial court on the motion to dissolve, covering the circumstances of the picketing and the damages resulting therefrom. The evidence offered by defendants consisted of a copy of the charge filed by Henderson on October 25, 1963 before the Regional Director of the National Labor Relations Board and the letter of the Regional Director dated October 31, 1963 declining to issue a complaint upon the charge upon the ground of insufficient evidence. Similar charges, filed in 1960, were offered by the defendants and rejected by the court as being too remote in point of time to have probative value.

At the first appearance of these documents in evidence, plaintiff's counsel interposed, and thereafter kept alive (A. 48-51) the basic objection that jurisdiction of the subject matter of an action can never be conferred by consent, waiver, or estoppel, and that, since the National Labor Relations Board is a tribunal of special or limited jurisdiction, the facts establishing its jurisdiction must be affirmatively shown before the jurisdiction of a court of general jurisdiction over the same subject matter may be denied under the doctrine of pre-emption or otherwise.

The answer, filed after the temporary injunction had been issued, again pleaded lack of jurisdiction in the State court and the claim of exclusive jurisdiction in the National Labor Relations Board (A. 42, 43).

No evidence was offered in the trial court, either at the time of the hearing on the motion to dissolve, nor at the final hearing on the merits, to establish the existence of a labor dispute within the meaning of the Federal Act, or to establish facts which would affirmatively show a labor dispute and consequent jurisdiction in the National Labor Relations Board. The only evidence on that issue offered by defendants, consisted of the charge filed before the Regional Director, and his refusal to issue a complaint thereon after an ex parte investigation at which no witnesses were produced for testimony and cross-examination. There was no evidence whatever of any affirmative finding by the National Labor Relations Board that a labor dispute exists or that interstate commerce is adversely affected thereby.

At the conclusion of all of the evidence, the trial court made specific findings, including the finding of the nonexistence of a labor dispute (A. 44), that the court has jurisdiction to grant relief and is not barred by the Federal Act from exercising that jurisdiction; that the plaintiff is entitled to recover damages in the amount specifically found by the court; and that the acts complained of constitute a willful and malicious interference with plaintiff's business, for which he is entitled to both actual and punitive damages (A. 47).

The Supreme Court of Missouri, on appeal, has reversed the decree and judgment of the court below on the stated ground that exclusive jurisdiction of the matters at issue rests in the National Labor Relations Board, and that defendant's motion to dismiss for lack of jurisdiction should have been sustained (A. 9).

The Appendix, page 48 and following, contains such necessary pertinent quotations from the record, or summary thereof, as will show that the federal questions here involved were timely and properly raised.

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Is in Direct Conflict with the Principles Announced by This Court in the Garmon, Weber[4] and Other Decisions, All of Which Require a Showing of Facts Reasonably Within the Applicable Sections of the Federal Act in Order to Deprive State Courts of Their Common Law Jurisdiction Over the Acts of Labor Unions Committed Without the Existence of a Legitimate Labor Objective to Justify Them.

The decision below, if permitted to stand, will greatly enlarge, and extend far beyond the Congressional intent, and far beyond the applicable holdings of this Court, the jurisdiction of the National Labor Relations Board and consequent denial of the common law jurisdiction of the State courts thereby imposing added burdens upon the already over-burdened federal judiciary. No longer will it be necessary to show a legitimate labor objective in order to deprive the state courts of their common law jurisdiction to deal with the wrongful conduct of labor unions committed outside the area of labor controversy. It will be enough to assert, even on palpably false claims, that their acts are committed in the name of labor.

In the case at bar, the *real purpose* of the offending picketing—the real objective of defendants—was to destroy plaintiff's business. Defendant union had no interest in plaintiff's employees—no legal right to represent them. Indeed, the banners themselves expressly negated even the desire on the part of defendant union to represent them. The *stated* purpose of the banners was to "inform the public" that Henderson's men do not receive certain benefits which the defendant union claims that it has "established"

4. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236; *Weber* v. *Anheuser Busch*, 348 U.S. 468.

in the area, thus ignoring the right of the union that *does* represent plaintiff's employees to contract for them the benefits which *that* union has "established". The defendant's principal officers, under oath, made the false claim that Henderson pays substandard "wages", but were hard put to define any legitimate objective for the picketing; and the fact is that the wages Henderson pays are higher than those received by the workers under Local No. 8 contracts.

The important fact, however, is that the wages and working conditions of Henderson's employees were negotiated by the union of their own choosing, the duly certified bargaining agent for them, and Henderson was bound by his contract to deal exclusively with that union, and not with defendant. Hc could not deal with defendant union without violating his contract, and without violating the law.

The case at bar is almost an exact parallel with the case of *Adams Dairy Company* v. *Burke*, 293 S.W.2d 281, decided by Division No. 2 of the Supreme Court of Missouri. In that case, also, the defendant union was not the certified bargaining agent for plaintiff's employees, who were represented by another union. Notwithstanding that lack of representation, the defendant union in the Adams case attacked the plaintiff by handbills—a secondary boycott—and plaintiff brought a common law action for conspiracy, and for an injunction. Division No. 2 of the Supreme Court of Missouri, in sustaining the jurisdiction of the state court to enjoin as against the contention that the exclusive jurisdiction was in the National Labor Relations Board, after full consideration of the evidence, correctly ruled that the facts before the court did not present a "labor dispute" within the meaning of the Federal Act, and that the State court, rather than the National Labor Re-

lations Board, had jurisdiction over the suit to enjoin, and for damages for the acts committed in the course of carrying out the conspiracy described in the petition.

The court below, in the instant case, refused to follow Burke on the stated ground that it was decided prior to Garmon and was in violation of the principles laid down by this Court in Garmon (A. 7), quoting the language of Garmon that:

"(W)hen an activity is *arguably* subject to #7 or #8 of the (N.L.R.) Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board."

The court below, by its opinion, has thus construed this Court's opinion in Garmon as *changing the law* over the law as declared by this Court in prior decisions, and, by the use of the word "arguably", departing from the principle, as announced in prior decisions, that the doctrine of pre-emption applies where the facts "reasonably" bring the controversy within the protection afforded by the federal act.

It is, however, perfectly clear from a reading both of Garmon and of Weber (*Weber* v. *Anheuser Busch*, 348 U.S. 468) that the Court, by the use of the word "arguably" in Garmon, did not seek to broaden the test, as laid down in Weber, namely, that the test is that of "reasonableness". Indeed, as was pointed out in petitioner's motion for rehearing filed in the court below (A. 20, 21), there is no difference, in principle, between Garmon and Weber, the word "arguably" being synonymous with, and conveying exactly the same meaning as the word "reasonably".

The facts before the Court, both in Garmon and in Weber, disclosed the existence of a labor dispute within the meaning of the federal act. In Garmon, the State court

had expressly found, and this Court accepted as a fact, that "the behavior of the petitioning unions constitutes an unfair labor practice". In Garmon, the purpose of the picketing was to compel the employer to sign a union contract requiring it to employ union members. These were the facts before the Court which were characterized as "arguably" bringing the case within the federal act.

In Weber, also, a labor dispute was involved. The Court, in applying the doctrine of pre-emption, uses the following language:

> "(Where the) moving party itself alleges unfair labor practices (under the federal law), where the facts *reasonably* bring the controversy within the sections prohibiting these practices, and where the conduct, if not prohibited by the federal act, may be reasonably deemed to come within the protection afforded by that Act, the state court must decline jurisdiction".

Division No. 2 of the Missouri Supreme Court, in the Burke case, which Division No. 1 of that Court, in the opinion sought to be reviewed, refused to follow, fully recognizes the doctrine of pre-emption, and correctly holds that its application covers only those cases where the facts *reasonably* bring the controversy within the sections of the federal act prohibiting unfair labor practices. Concerning Weber, the court in Burke, after quoting the foregoing language from Weber, correctly states:

> "It is clear from this statement that if these enumerated conditions are *not* present, state courts are not prohibited by reason of the federal act from exercising jurisdiction. In this case plaintiff did not allege 'unfair labor practices' under the federal act, and we are of the opinion that the facts do not *reasonably* bring the controversy within the sections of the federal act prohibiting 'unfair labor practices' or within that conduct for which protection is afforded by that act."

Thus Burke rationally harmonizes its decision with Weber; and, since there is no difference in meaning between the word "arguably" and the word "reasonably", Burke is also in full harmony with Garmon. Any different view would broaden Garmon far beyond the meaning, the intention, and the language, of the opinion of the Court in the use of the word "arguably" rather than the word "reasonably".

It will be noted that this Court declined certiorari to review Burke. (*Adams Dairy Co.* v. *Burke*, 352 U.S. 969). We are not unmindful of the rule that such action does not amount to approval of the opinion of the court below, the review of which by certiorari is thus denied; but it is equally true that, by denial of certiorari, this Court did not *disapprove* that decision.

The question thus presented is one of great public interest. The court below, by its opinion, seeks to construe Garmon as a decision modifying Weber (and thus broadening the jurisdiction of the National Labor Relations Board) and the pre-emptive doctrine, to include those cases where the facts do not present a case involving a labor dispute. Such was never the intention of the Congress. Such was not the intention of this Court in Garmon.

In another respect, the opinion below broadens, and extends far beyond the Congressional intent, the meaning of the word "dispute" as used in the federal act, and in all of the decisions, both federal and state, dealing with it. The word "dispute" as thus used, means a controversy *that is capable of adjustment*. To "dispute" is to argue about, to discuss, to controvert. (Brittanica World Dictionary, Vol. I, p. 369). A "controversy" is a "debate or disputation" (Ibid, p. 284). Ordinarily, any dispute as to wages or working conditions is susceptible of being resolved by the agreement of the parties involved in the dis-

pute. But, where resolution of the dispute is impossible to attain, then that element of the word "dispute" which contemplates the ability to resolve that dispute, ceases to exist.

We find no decision of this Court dealing with that precise principle, but it is well illustrated by the decision of the U. S. Court of Appeals, 7th Circuit, in *NLRB* v. *Indiana Desk Co.*, 149 F.2d 987, where that Court ruled that no labor dispute was involved, within the meaning of the federal act where the employer could not legally accede to the demand of his employees for a wage increase because, by federal law and Presidental proclamation, it was made a crime to grant a wage increase to employees engaged in the performance of war contracts without the consent of the War Labor Board. The court there held that a labor dispute, within the meaning of the federal act, is something that is capable of adjustment by the parties,[5] and where it was not within their power to settle or adjust that which was claimed to be a labor dispute, the National Labor Relations Board was without jurisdiction of the subject matter of the action.

The Missouri court, in Burke, held:

> "It is inconceivable that the public policy of this State should be to label as a legitimate labor objective the willful and intentional damaging or destruction of an employer's business because the employer is doing that which the Federal Law requires him to do and forbids him to change if he is to continue in business."

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5. In the Indiana Desk case (l.c. 990), the Court states: "Ordinarily, of course, a controversy concerning wages would involve a labor dispute. Also, ordinarily, a dispute, labor or otherwise, is something capable of adjustment by the parties. In the instant situation, however, it was not within the power of the strikers and respondent to settle or adjust that which is claimed to be a 'labor dispute'. In fact, by a positive provision of law they were precluded from so doing. It hardly seems reasonable to think that a 'labor dispute' was intended to include a dispute the settlement of which would have violated a statutory provision."

The opinion of the court below does violence to that rule, and seeks to broaden the Federal Act, and the doctrine of pre-emption, to include even those matters where the parties are powerless, under positive provisions of the law, to accede to the demands of labor which are entirely outside the scope of legitimate labor controversy. Here, also, the public interest is great, and the need for authoritative declaration of the applicable law by this Court is evident.

If the opinion of the court below is permitted to stand, the right and power of state courts to exercise their common law jurisdiction over labor organizations in matters where their acts are not committed in furtherance of any legitimate labor objective will be foreclosed, and members of the public injured by such acts will be left entirely without a remedy. The result reached by the court below in the case at bar is one that shocks the conscience and destroys the faith of the public in the administration of justice. The Regional Director of the Labor Board declined to issue any complaint, and refused to hear petitioner. That avenue of escape from the damaging effects of the unlawful acts of the defendant union was closed against him. The court below, by its opinion, has now closed off the only other avenue of escape, and has left him in a position where he has no lawful recourse to protect himself against conduct characterized by the trial court's findings, and abundantly shown by the evidence (none of which evidence is referred to in the opinion below) as being "unlawful and in violation of the rights of plaintiff * * * and (that) all of such acts of defendants constitute a malicious interference with plaintiff's business." (A. 45). By that same finding and decree, plaintiff was awarded punitive damages (in addition to actual damages) because "the acts of defendants complained of constitute

a willful and malicious interference with plaintiff's business." (A. 47).

The right of labor to strike and to picket, and to seek, by all lawful means, the accomplishment of its legitimate labor objectives, has been widely acclaimed, and is universally recognized; but it is a matter of great public interest that such rights be not extended to include the conduct of labor which has no legitimate labor objective.

It is, therefore, respectfully submitted that this Court should grant certiorari in this case and authoritatively and effectively limit the conduct of labor to its legitimate labor objectives. The public is greatly concerned that the common law jurisdiction of the state courts must be preserved to deal with those cases (such as the case at bar) where no legitimate labor objective is involved. It is of great public importance that the common law jurisdiction of the State courts in matters where no labor dispute is involved should never be curtailed by judicial interpretation, and additional burdens thus shifted to the federal judiciary.

II.

The Opinion Below, in Giving Evidentiary Value to the Refusal of the Regional Director to Issue a Complaint, Notwithstanding the Non-existence of a Legitimate Labor Objective and the Admitted Fact That the National Labor Relations Board Made No Finding of Facts to Support Its Jurisdiction, Is in Direct Conflict with the Fundamental Principle, Fully Recognized by Numerous Decisions of This Court, That Jurisdiction of the Subject Matter Must Be Affirmatively Shown, and Cannot Be Waived, or Conferred by Prior Action, Consent or Estoppel.

It is obvious that the thinking of the court below, in the preparation of its opinion, was greatly influenced by the fact that, before the present suit was instituted, the petitioner had sought relief from the National Labor Re-

lations Board. As pointed out in the brief filed in, but overlooked in the Court below, and in the motion for rehearing, however (A. 25, 27), that Board is a tribunal of special, limited jurisdiction, and unless the facts upon which its jurisdiction rests actually exist, and findings thereof disclose their existence, no action on the part of the petitioner, or even on the part of the Board itself, could confer jurisdiction where none existed. Consequently, unless there be an affirmative finding of facts sufficient to disclose jurisdiction, any action taken by the Board, or by the parties cannot confer that jurisdiction.

In the case at bar, there is no proof of any kind that the Board ever made any finding of any fact in support of its jurisdiction,[6] or even that any such facts ever existed. There is, however, abundant proof in the record made in the *State* Court that the jurisdictional facts do *not* exist, because it is well established that the jurisdiction of the Board depends not only upon the involvement of interstate commerce, but also upon the existence of a legitimate labor dispute. There is also abundant proof of the facts, supporting the finding of the trial court, that no labor dispute *is* involved, and that the state court *does* have jurisdiction.

This Court has many times spoken upon the subject. In *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178, and the companion case of *McNutt* v. *McHenry Chevrolet Co.*, 298 U.S. 190, the court dismissed suits to

6. The Board never had the opportunity to inquire into the facts which would be necessary to support its jurisdiction. The Regional Director investigated the charge for the purpose of determining probable cause, that is, violation of the Federal Act by the picketing union, and came to the conclusion that the acts complained of were not "proscribed" by the federal act; hence no complaint was issued, no formal hearing was had, no evidence, with right of cross-examination, was adduced, either on the issue of commission of acts proscribed by the federal act, or on the jurisdictional issue.

restrain the enforcement of statutes regulating retail business because there was no evidence and no finding, showing that the matter in controversy exceeded the jurisdictional amount of the federal District Court. Mr. Chief Justice Hughes, in the *General Motors* case, said:

> "They are conditions which must be met by the party who seeks the exercise of jurisdiction in his favor. He must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations, he has no standing. If he does make them, an inquiry into the existence of jurisdiction is obviously for the purpose of determining whether the facts support his allegations. * * * If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof. And where they are not so challenged the court may still insist that the jurisdictional facts be established or the case dismissed. * * * Here, the allegation of the bill of complaint as to the jurisdictional amount was traversed by the answer. The court made no adequate finding upon that issue, and the record contains no evidence to support the allegation of the bill. There was thus no showing that the District court had jurisdiction and the bill should have been dismissed upon that ground."

In *U. S.* v. *Griffin*, 303 U.S. 226, 229, Mr. Justice Brandeis said:

> "Since lack of jurisdiction of a federal court touching the subject matter of the litigation cannot be waived by the parties, we must upon this appeal examine the contention; and if we conclude that the District Court lacked jurisdiction of the cause, direct that the bill be dismissed."

In *U. S.* v. *Corrick*, 298 U.S. 435, 440, Mr. Justice Roberts said:

> "The appellants did not raise the question of jurisdiction at the hearing below. But lack of jurisdiction of a

federal court touching the subject matter of the litigation cannot be waived by the parties, and the district court should, therefore, have declined sua sponte, to proceed in the cause."

In *American Fire Ins. Co.* v. *Finn*, 341 U.S. 6, 17, Mr. Justice Reed said:

> "The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation or by prior action, or consent of the parties. To permit a federal trial court to enter a judgment in a case removed without right from a state court where the federal court could not have original jurisdiction of the suit even in the posture it had at the time of judgment would by the act of the parties work a wrongful extension of federal jurisdiction and give district courts power the Congress has denied them."

In the case at bar, it matters not whether plaintiff, in filing the charge with the Regional Director, did so under the mistaken notion, either of the law or of the fact, that the Board had jurisdiction of his charge; or did so with the deliberate intention of *conferring* jurisdiction on that Board. In neither view would his act confer jurisdiction where none, in fact, existed. Were it otherwise, it would be entirely within the control of the parties to "work a wrongful extension" of the Board's jurisdiction and give it power "the Congress has denied."

The opinion of the court below does just that. Without any finding of facts by the Board, without any reference in its opinion to the controlling facts, the court below has worked a "wrongful extension" of the jurisdiction of the Board, giving to it "power the Congress has denied."

In this, also, the public interest is great. The jurisdiction of the National Labor Relations Board should at all times be kept within Congressional limits. Those limits require the existence of a bona fide labor objective in a

matter affecting interstate commerce, and, in the absence of supporting facts, and of a finding of such facts, the common law jurisdiction of the state courts to deal with the conduct of labor where no legitimate labor objective is involved should be preserved.

It is respectfully submitted that the petition for certiorari should be granted.

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